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Supreme Court, U.S.
FILED
JAN 2 5 2005
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No. 04-723

In The

# Supreme Court of the United States

STEVEDORING SERVICES OF AMERICA
and HOMEPORT INSURANCE CO.,

*Petitioners,*

v.

AREL S. PRICE; Director,
Office of Workers' Compensation Programs,
U.S. DEPARTMENT OF LABOR,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT PRICE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## RESPONDENT PRICE'S RESPONSE TO PETITIONERS' STATEMENT OF DECISIONS BELOW

The administrative law judge (ALJ) made various findings, which an appellate court must affirm, if there was substantial evidence in the record as a whole to support them. 33 U.S.C. §921(b)(3). The ALJ decided that the petitioners should calculate Arel Price's average weekly wage for his July 2, 1998 injury pursuant to 33 U.S.C. §910(a) because he had worked substantially the whole of the year immediately preceding his injury. App. 42. The Ninth Circuit has defined "substantially the whole of the year," as more than 75 percent of 260 days for a five-day-per-week worker such as Arel Price. The ALJ also found that Arel Price's employment at the Port of Longview was not seasonal or intermittent, but was stable and continuous. App. 12, 42.

The petitioners do not challenge the ALJ's finding that Arel Price's employment was stable and continuous and not seasonal or intermittent. They challenge instead the Ninth Circuit's rule in *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), that a worker who worked more than 75 percent of his workdays worked substantially the whole of the year immediately preceding his injury. The rule they challenge is not "the 75 percent rule." It is "the more than 75 percent rule."

The petitioners contend that the ALJ should have determined that he could not fairly and reasonably apply 33 U.S.C. §910(a) because it resulted in over-compensation, and that he should have applied 33 U.S.C. §910(c) instead in calculating Arel Price's average weekly wage.

## RESPONDENT PRICE'S RESPONSE TO PETITIONERS' REASONS FOR GRANTING THE WRIT

### 1. Calculation of Average Weekly Wage Issue

#### A. The Ninth Circuit Decision Is Consistent With The Decisions In All Other Circuits.

Congress did not define the term "substantially the whole of the year immediately preceding his injury," in 33 U.S.C. §910(a), and left it to the courts to decide how to apply this. In *Matulic, supra*, the Ninth Circuit decided the percentage as "more than 75 percent." No other circuit has decided this specific issue, and the petitioners' statement that this decision conflicts with the law in the District of Columbia and the Seventh Circuits, as well as probably the Fifth Circuit, is incorrect.

The Ninth Circuit held in *Matulic* and reaffirmed in the present case that if a worker generally works five days per week, but did not do so in the year before his injury, it would still apply Section 10(a) of the Longshore & Harbor Workers' Compensation Act (Act) in calculating his pre-injury average weekly wage if he worked substantially the whole of the year before his injury. It defined this as "more than 75 percent" of the available work days.

The Ninth Circuit recognized that workers may miss work for one reason or another such as illness, family emergencies, vacations, holidays and lack of work. It felt that if a worker worked more than 75 percent of the work days prior to his injury, this constituted substantially the whole of the year, and it would apply Section 10(a) in calculating his average weekly wage. It stated that if this results in "over-compensation," that was Congress' intent in adopting the language. *Matulic, supra,* at 1058-59.

A court could also apply Section 10(a) if the worker worked 75 percent of the days or less, but the Ninth Circuit did not require it. The petitioners essentially complain about this rule because they contend that more than 75 percent of the work days is too low to define as "substantially the whole of the year immediately before the injury," not because it conflicts with the law in other circuits.

In fact, this decision is consistent with the case law in other circuits. In *Johnson v. Britton*, 290 F.2d 355 (D.C. Cir. 1961), the injured claimant was a construction worker who worked only 180 days in the year before his injury due to inclement weather and lack of work. The District of Columbia Circuit Court refused to apply Section 10(a) in calculating Johnson's average weekly wage because it stated that to do so " . . . would result in a highly distorted earnings future . . . " and it felt from the record that the claimant's work was seasonal and intermittent, and not regular. *Johnson, supra,* 290 F.2d at 359. This case is consistent with the Ninth Circuit's rule in *Matulic* because the claimant in *Johnson* in fact had worked less than 75 percent of the available days and his work was seasonal and intermittent. The Ninth Circuit would have applied Section 10(c) in *Johnson* as well.

In *Strand v. Hansen Seaway Service*, 614 F.2d 572 (7th Cir. 1980), the Seventh Circuit applied Section 10(c) to a worker whose work was seasonal because his port, Milwaukee, Wisconsin, was open only 36 weeks during the year due to adverse weather conditions. It held that this employment was not regular and continuous, and it relied on legislative history to hold that Section 10(c) governed the calculation of the average weekly wage for seasonal workers.

It is not clear from the opinion how many days the claimant in *Strand* actually worked in the year preceding his injury. The Seventh Circuit indicated he worked 252 days, but this would mean he worked every day including every weekend and all holidays, including Easter, July 4th and Labor Day, from the second week in March to mid-November, and this is difficult to believe. Based on the undisputed fact that Strand's work was seasonal and intermittent and he was able to work only 252 days per year if he worked every single day, the Seventh Circuit refused to apply Section 10(a) in calculating an average weekly wage, and the Ninth Circuit would have done the same. It specifically distinguished the facts of *Strand* from the present case. App. 11-12. *Strand* is different from the present case because the ALJ specifically found Arel Price's work was regular and continuous, not seasonal, and this is a finding the petitioners do not challenge. App. 11-12.

The petitioners' argument that the *Matulic* rule probably would also conflict with the rule in the Fifth Circuit is speculation. *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997), which they cited in support of their petition, involved a construction worker, and the parties had agreed on an average weekly wage calculation pursuant to Section 10(c) because of his seasonal employment. The case was on appeal only because the employer wanted a lower calculation based on three years of earnings rather than one. This case had nothing to do with whether Section 10(a) rather than 10(c) should have applied. It involved the question of whether the ALJ had a substantial basis in the record to use the claimant's earnings for only one year in calculating his average weekly wage pursuant to Section 10(c).

The conflict among the circuits which the petitioners argue as a basis to grant certiorari is non-existent. No other circuit has ruled differently on the application of Section 10(a) to an average weekly wage calculation, and there is no reason for this Court to grant the petition for writ of certiorari on this basis.

### B. The Ninth Circuit Decision Is Not Inconsistent With *Rambo II*.

The petitioners also argue that application of Section 10(a) in a case where a claimant has worked slightly "more than 75 percent" is inconsistent with the need for accuracy in calculating benefits in the Act. They argue that this Court's decision in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed.2d 327 (1997) (*Rambo II*), rejects the Ninth Circuit's premise in *Matulic* that Congress legislated some "over-compensation" in the Act. Pet. for Cert., pp. 12-14. *Rambo II*, however, has no application to the present case. It involved the question of whether an ALJ could award a nominal weekly amount to keep a claim for permanent disability open for future modification, even though the claimant had not suffered a present loss of wage-earning capacity. This Court held an administrative law judge had the authority to do so if the claimant could show a significant potential of a lower wage-earning capacity in the future.

*Rambo II* involved an interpretation of Section 8 of the Act, not Section 10, and the language in the two sections is different. There is nothing in Section 8 prohibiting a nominal award. On the other hand, Section 10(a) specifically requires its application where a worker worked "substantially the whole of the year immediately preceding his injury." It does not state the worker had to work every

day. "Substantially the whole of the year" is less than every day. In following the plain language of Section 10(a), which the Ninth Circuit did in *Matulic* and in the present case, it followed a principle of statutory construction that this Court had previously required when the Act did not favor the interpretation the injured worker requested. A court must follow the plain language of the Act, even if it may be inequitable. It is up to Congress, not the courts, to correct deficiencies in the Act. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992); *Potomac Electric Power Co. (PEPCO) v. Director, OWCP*, 449 U.S. 268, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980); *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980).

Complete accuracy in awards of compensation is not a uniform rule in the Longshore and Harbor Workers' Compensation Act. In *PEPCO, supra,* this Court held that the plain language of the Act required implementation of a scheduled permanent partial disability award even when the economic effects of the injury were much greater than the scheduled award provided. In that instance, this Court specifically stated the plain language of the Act controls what otherwise might be a fairer and more equitable result. In *Estate of Cowart, supra,* this Court refused to allow a substantial award of benefits where the claimant had not obtained the written agreement of the employer and compensation carrier to a third-party settlement. It held that the injured worker still needed to obtain the employer's and carrier's written consent to a third-party settlement to pursue further benefits under the Act, even where the carrier was denying any further entitlement to benefits. This Court held it could not bend the plain language of the statute to correct an apparent injustice.

The petitioners' basic argument is that the "more than 75 percent rule" is not fair, and that it distorts compensation awards. Pet. for Cert., pp. 18-19. However, this is an argument for Congress to amend the Act, not for this Court to accept review and legislate what the petitioners argue Congress should have done.

### C. Petitioners Want This Court To Amend The Act, Which Is The Exclusive Province Of Congress.

The petitioners also contend that the Ninth Circuit rule ignored the phrase in Section 10(c), "If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. . . . " In other words, the petitioners complain that if a worker worked more than 75 percent of the workdays, the Ninth Circuit has removed any flexibility in using Section 10(c) of the Act to calculate an average weekly wage because *Matulic* and the present case hold that an ALJ must use Section 10(a). They claim in essence that the "more than 75 percent rule" is too low a threshold to limit the flexibility in using Section 10(c). Pet. for Cert., pp. 16-18.

This argument is another appeal to this Court instead of to Congress to correct what they claim is an inequity in the Act. In *Matulic* The Ninth Circuit held in substance that if an employee who is a regular worker worked more than 75 percent of the workdays, an ALJ must apply Section 10(a) in calculating the average weekly wage and must do so. If the claimant worked 75 percent or less of the workdays, the ALJ would have flexibility in applying Section 10(a) or 10(c).

The Ninth Circuit decision in *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101, 103 S.Ct. 2446, 77 L.Ed.2d 1329, *decision on remand*, 713 F.2d 462 (1983), is consistent with *Matulic* and, in fact, was in part the basis for its decision. In that case, the injured worker worked exactly 75 percent of the workdays, and the Ninth Circuit affirmed an average weekly wage calculation pursuant to Section 10(c). In *Matulic*, it drew the line at more than 75 percent based on its decision in *Duncanson-Harrelson*. The Ninth Circuit decision and reasoning in *Duncanson-Harrelson* is completely consistent with *Matulic* and the present case.

**2. Concurrent Awards Issue.**

**A. The Ninth Circuit Decision Is Consistent With 33 U.S.C. §908(a) And All Prior Court Decisions.**

The petitioners argue that allowing Arel Price to receive both his permanent partial disability award from his 1979 injury and his 1998 permanent total disability award violates both 33 U.S.C. §908(a) and 33 U.S.C. §906(b)(1). The latter section establishes a maximum weekly compensation rate for disability benefits. Petitioners also argue that no other court decision allows a claimant to receive concurrent awards of disability in excess of two-thirds of his average weekly wage. They contend this violates 33 U.S.C. §908(a).

Both of these contentions are incorrect, and the petitioners' effort to create a conflict among the circuits has no merit. The ALJ found that Arel Price's wage-earning capacity had not increased from 1979 to 1998.

App. 20. This is a key finding, and the petitioners did not challenge this on appeal. This means that Arel Price's average weekly wage in 1998 reflects his prior loss of wage-earning capacity from his 1979 injury. Put another way, it means that his average weekly wage in 1998 would have been higher had he not been hurt in 1979.

The petitioners inexplicably state:

> . . . The Ninth Circuit's . . . reasoning is based on the assumption that Price's earnings would have been greater in 1998, but for the disability resulting from his previous injuries. (App. 13-17) That reasoning has no support in the record, and none whatever in the Act. . . .
>
> Pet. for Cert., p. 22.

The petitioners are wrong. Not only was there factual support for this in the record, but they did not challenge this factual support on appeal. App. 20. It is undisputed on appeal that Arel Price had a loss of earning capacity as a result of his 1979 injury, and his 1998 pre-injury average weekly wage reflected this loss.

The Ninth Circuit allowed Arel Price to keep his permanent partial disability award, which was two-thirds of his loss due to his 1979 injury, and it also separately allowed him his permanent total disability claim up to the maximum weekly rate pursuant to 33 U.S.C. §906(b)(1). This was not "double dipping" because these were two separate injuries with separate losses. App. 19.

This ruling was completely consistent with every other circuit court decision on this issue. In *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419

(9th Cir. 1995), the Ninth Circuit remanded a claim where the claimant, Henry Anderson, was receiving both a permanent partial disability award and a subsequent permanent total disability award concurrently. It directed the ALJ on remand to determine whether Mr. Anderson's wage-earning capacity had increased after his permanent partial disability award and before the injury that resulted in permanent total disability. If his wage-earning capacity had not increased, Mr. Anderson would be entitled to receive both awards. If it had increased, the ALJ would have had to decrease the weekly benefits of the first award. In the present case, the ALJ's finding that Arel Price's wage-earning capacity had not increased from 1979 to 1998 entitles him to both awards concurrently.

The other cases petitioners cite as in conflict with the present case involve different factual and legal issues and are not relevant to the issue in the present case. *Korineck v. General Dynamics Corp.*, 835 F.2d 42 (2nd Cir. 1987), involved a permanent total disability claim and a *subsequent* scheduled permanent partial disability claim for hearing loss. The Second Circuit held that once a claimant is permanently totally disabled, he cannot obtain additional disability. That is, he cannot be more than permanently totally disabled. In *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956), the claimant was permanently totally disabled as a result of a fall. He also claimed a scheduled permanent partial disability award for facial disfigurement as a result of the fall, and the Ninth Circuit held he could not be more than totally disabled as a result of one injury.

In the present case Arel Price was partially disabled 19 years *before*, not *after*, he was totally disabled, and the law allows concurrent awards in this situation. *Brady-Hamilton*

*Stevedore Co., supra; Crum v. General Adjustment Bureau*, 738 F.2d 474 (D.C. Cir. 1984); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir.), *cert. den.* 449 U.S. 905 (1980).

In *Bunol v. George Engine Co.*, 996 F.2d 67 (5th Cir. 1993), the court held that a claimant could not receive awards of temporary total disability and permanent partial disability at the same time for the same injury. The petitioners' description of the facts of this case as involving two different injuries is wrong. Pet. for Cert., p. 20. This incorrect statement is crucial in understanding why *Bunol* has no application to the present case.

*ITO Corp. of Baltimore v. Green*, 185 F.3d 239 (4th Cir. 1999), also is inapplicable to the present case. It involved scheduled and unscheduled permanent partial disability awards arising out of the same injury, and the Fourth Circuit held that the weekly payment for two permanent partial disability awards from one injury could not exceed two-thirds of the claimant's average weekly wage for that injury. In that situation, a court had to adjust the payment of the awards to avoid exceeding two-thirds of the claimant's average weekly wage. Unlike *Green*, however, the present case involves two unscheduled awards from two different injuries 19 years apart, not two awards from one injury with one average weekly wage.

None of these cases is in conflict with the present case. The Ninth Circuit did not hold that Arel Price was more than totally disabled, as petitioners argue. He was partially disabled in 1979 and totally disabled in 1998, and he was entitled to both awards because his average weekly wage in 1998 was less than it otherwise would have been had he not been injured 19 years earlier.

### B. The Ninth Circuit Did Not Misconstrue §906(b)(1).

The Ninth Circuit did not misconstrue Section 906(b)(1) when it held that the maximum rate applied to each claim and not to all concurrent claims over a lifetime. The Ninth Circuit is the only circuit which has addressed this issue, other than the District of Columbia Circuit *in dictum*. Section 906(b)(1) states:

> Compensation for disability or death. . . . shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary . . . .

The question is whether the term "compensation for disability" refers to one claim or to all concurrent claims over a lifetime so that the maximum weekly rate on July 2, 1998 applied to Arel Price's awards both for his 1979 injury and his 1998 injury, or whether it applied to both claims separately.

The Ninth Circuit reasoned that the plain language of the statute, the legislative history and public policy favored the interpretation that the maximum rate applies to individual claims, and not to lifetime concurrent claims. App. 21-25. This interpretation is also consistent with the District of Columbia Circuit's *dictum* in *Hastings v. Earth Satellite Corp.*, *supra*. No circuit court has held contrary to this.

The petitioners argue that this interpretation creates an anomaly in which Arel Price receives more in benefits from two awards than he would receive had he suffered the same loss of wage-earning capacity in one injury. Pet. for Cert., p. 25. This is because of the statutory maximum

weekly rate limit in Section 6(b)(1) of the Act. If Arel Price had not been hurt in 1979 and there was no statutory limit on his weekly compensation rate, his one award for his 1998 claim would be the same as he would receive from his two injuries. The anomaly the petitioners argue is due to the statutory weekly maximum compensation rate, which Congress established, not the Ninth Circuit's ruling.

Even if this were due to the Ninth Circuit's ruling, the Longshore and Harbor Workers' Compensation Act is not a perfectly equitable law. It is a product of legislative compromises. This Court recognized this in *PEPCO, supra,* 449 U.S. at 281-84, when it refused to interpret the Act in an equitable manner which conflicted with its plain language. In establishing a weekly compensation rate of two-thirds of an average weekly wage and a weekly maximum compensation rate, Congress created artificial limits on what an injured worker could receive in weekly benefits. This, too, may not be fair and equitable.

However, this Court is not the avenue to correct what the petitioners feel are anomalies in the Act. That is and should be the province of Congress. The Ninth Circuit rulings are logical, consistent with the language and policies of the Act and are not in conflict with decisions from any other circuits.

## CONCLUSION

For the foregoing reasons, this court should deny the petition for writ of certiorari.

Respectfully submitted,

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